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No. 97-601

In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL ELECTION COMMISSION, PETITIONER

v.

LARRY R. WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. Respondent does not seriously dispute that the decision in this case conflicts with other appellate decisions. In holding that the statute of limitations that applies to actions "for the enforcement of any civil fine, penalty, or forfeiture" (28 U.S.C. 2462) also governs actions seeking injunctive relief, the decision of the court of appeals conflicts with the decisions of "several circuits" (Br. in Opp. 6). See Pet. 18-19 & n.3. In particular, the decision in this case squarely conflicts with the decision of the Eleventh Circuit in *United States* v. *Banks*, 115 F.3d 916, 919 & n.6 (1997), petition for cert. pending, No. 97-602 (filed Oct. 2,

1997), which held that "section 2462 does not apply to equitable remedies."

In the face of this manifest conflict of decisions, respondent does not even attempt to justify the decision below on its own terms. To the contrary, respondent admits that (Br. in Opp. 4):

> [i]n cases where an enforcement agency * * * can show continuing misconduct, or a substantial likelihood of present misconduct, it could * * * obtain injunctive relief, notwithstanding the unavailability of fines or damages.

Declining to attempt to justify the reasoning applied by the court below, respondent instead offers a new rationale that was not raised or addressed in the court of appeals. Respondent contends that an injunction was not proper in this case because there was "no showing of any likelihood of recurrence of misconduct" and thus no evidentiary basis for equitable relief to have been awarded (*ibid.*). That new assertion is both untimely and incorrect.

a. The court of appeals, of course, did not address whether a sufficient evidentiary basis existed for injunctive relief in this case. Instead, the court of appeals held that the statute of limitations had expired before the suit was commenced. Having concluded that the case "was untimely and should have been dismissed" (Pet. App. 9a), the court of appeals never addressed whether injunctive relief would have been an appropriate exercise of equitable discretion on the record of this case. The only issue addressed by the court of appeals was whether the suit "was untimely" (*ibid.*). Certiorari should be granted on that issue for the reasons set forth in detail in the petition (Pet. 10-19).

Respondent did not contend in his brief in the court of appeals that there was no sufficient evidentiary basis for an injunction in this case. The first time that respondent made such an assertion was in response to the petition for rehearing that the government filed after the court of appeals entered its decision. Because of its ruling on the statute of limitations issue, the court of appeals had no occasion to address the new rationale belatedly urged by respondent. It is "inappropriate" for respondent to seek to raise this new claim in this Court "in the first instance." *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312 (1971). See also *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. In any event, respondent is simply wrong in asserting that there is no evidentiary basis for the award of injunctive relief in this case. In entering the injunction, the district court noted that respondent's scheme was an obvious violation of the federal campaign contribution limitations and that "there is no doubt [respondent] knew of the Act's prohibitions" (Pet. App. 19a). Despite this clear evidence that respondent had committed numerous willful violations of the Act (*ibid.*), respondent nonetheless expressed the "continuing belief he committed no wrong-doing" (*id.* at 20a).[1] It was this total absence of any indication of "repentance and reform" (*United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333

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[1] The evidence on which the district court relied in awarding injunctive relief included respondent's sworn assertion that he did "not believe" his actions to have been unlawful and that he was "unable to comprehend" how his conduct was in violation of the Act (Excerpts of Record G, ¶ 18).

(1952)) that led the district court to conclude that it should enjoin respondent "from similar violations of the Act for a period of 10 years" (Pet. App. 19a-20a).

In the exercise of its equitable discretion, the district court reasonably concluded that injunctive relief was appropriate "based on" respondent's untenable assertions of innocence in the face of clear evidence of his "wrong-doing" (Pet. App. 20a). See, *e.g.*, *SEC* v. *Fehn*, 97 F.3d 1276, 1295 (9th Cir. 1996) (a "factor" to consider in determining whether injunctive relief is appropriate is "the defendant's recognition of the wrongful nature of his conduct"), cert. denied, 118 S. Ct. 59 (1997); *SEC* v. *Murphy*, 626 F.2d 633, 655 (9th Cir. 1980) ("[t]he existence of past violations may give rise to an inference that there will be future violations").[2] Respondent's contention that "no showing" was made "of any liklihood of recurrence of misconduct" (Br. in Opp. 4) simply ignores the reasoning and holding of the district court in awarding injunctive relief in this case.[3]

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[2] As respondent concedes (Br. in Opp. 8-9 & n.1), it is these very factors that are identified as governing the availability of injunctive relief under the appellate decisions on which he relies.

[3] Respondent asserts that statements by government counsel in the court of appeals constituted a "concession" that the government "had no reason to conclude" that respondent was likely to violate campaign contribution limitations again in the future (Br. in Opp. 1). Respondent provides no citation for that assertion. Respondent also fails to provide a citation for any of the similar assertions made elsewhere in his brief (*id.* at 3, 4). We are informed that government counsel made no such "concession" in the court of appeals and instead advised that court of the evidence on this issue on which the district court relied. See Pet. App. 19a-20a; Excerpts of Record G, ¶ 18; note 1, *supra*.

In any event, respondent's new factual assertion provides no support for the ruling of the court of appeals. The court of appeals did not address or rely on the contention that an inadequate showing of a "likelihood of recurrence" had been made. Instead, the court of appeals concluded that the statute of limitations on actions "for the enforcement of any civil fine" (28 U.S.C. 2462) bars this equitable action for injunctive relief. The sole rationale offered by the court was that, "because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations applies to both" (Pet. App. 5a). That reasoning is obviously unrelated to the new factual contention that respondent now advances.

In holding that this equitable action is barred by 28 U.S.C. 2462, the decision of the court of appeals creates a direct conflict among the circuits on an important and recurring question of federal law. See Pet. 10-19. Review by this Court is therefore warranted.

2. The court of appeals correctly noted that the statute of limitations "for the enforcement of any civil fine" (28 U.S.C. 2462) "is subject to equitable tolling" for fraudulent concealment of facts (Pet. App. 7a). The court erred, however, in holding that routine campaign finance reports "are, as a matter of law, sufficient" to give the Commission notice of violations and that such reports therefore commence the running of the limitations period (*ibid.*). As Judge Fletcher noted in dissent, that ruling improperly presupposes that the Commission has the authority and resources "to investigate every report, even though nothing on its face indicates illegal activity" (*id.* at 11a). By allowing the statute of limitations to run even when (as in the present case) the routine

reports filed with the Commission fail correctly to describe the underlying transactions (Pet. 22 n.6), the decision of the court of appeals drastically undermines the Commission's ability to enforce the federal campaign contribution laws. The court's ruling ensures that (Pet. App. 12a (Fletcher, J., dissenting))

> those who are most clever in deceiving the FEC and concealing their illegal contributions will be the least likely to be prosecuted successfully * * *.

Respondent suggests that the Commission could solve the problem created by this aspect of the court's decision simply by asking Congress for more "investigative resources" (Br. in Opp. 11 n.3). That suggestion fails, however, to give consideration to the enormous and unrealistic commitment of "resources" that would be required. As Judge Fletcher noted, to avoid the consequences of the decision in this case the Commission would be required "to investigate every report" filed with it (Pet. App. 11a). Congress plainly did not intend for that to occur, however, for it empowered the Commission to investigate possible violations only when a majority of its members determines that there is "reason to believe that a person" has violated the Act. 2 U.S.C. 437g(a)(2). The sort of roving investigative authority contemplated by the decision in this case simply does not exist. See Pet. 23-24.

The decision of the court of appeals thus has the direct consequence of ensuring that all but the most obvious violations of the federal campaign contribution limitations will go unsanctioned. As respondent notes (Br. in Opp. 10), there is as yet no conflict among the circuits on this second aspect of the

court's decision. Nevertheless, review of the second question presented in this case is warranted by the importance of that issue to the routine enforcement of the federal campaign contribution laws and by its interrelationship with the first question presented, on which there is a direct conflict among the circuits.

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For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 1997